Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1998

MOHAMMED ENTEZARI-AFSHAR,

Petitioner,

v.

ROBERT WRIGHT,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the district court erred in failing to hold an evidentiary hearing on petitioner's claim that he was denied a fair trial under the Fifth and Fourteenth Amendments of the U.S. Constitution, when prejudicial testimony was presented in violation of ER 404 and 403, that in Iran a woman takes no wealth from a marriage upon divorce, and that upon divorce a husband could have her killed or executed.

II. Whether the district court's failure to hold an evidentiary hearing on newly discovered evidence, unknown at the time of trial, but available to the state prior to trial through proper investigatory means, violated the petitioner's right to a fair trial, under the Fifth and Fourteenth Amendments of the U.S. Constitution.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner MOHAMMED ENTEZARI-AFSHAR, (hereinafter Mr. Entezari) through his attorney Lana C. Glenn, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

The memorandum opinion of the United States Court of Appeals for the Ninth Circuit, filed on December 30, 1998, that gives rise to this petition is unpublished by Order of the Ninth Circuit, and reprinted in the Appendix. (App. A). By order filed on February 17, 1999, the Ninth Circuit denied the petition for rehearing and rejected the suggestion for rehearing en banc. (App. B).

STATEMENT OF JURISDICTION

The Ninth Circuit delivered its Memorandum decision on December 30, 1998. A petition for rehearing was denied on February 17, 1999. Pursuant to Supreme Court Rule 13.1, this petition is timely filed with the Clerk of this Court within 90 days after entry of the judgment.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides, in part:

> No person shall . . . be deprived of life, liberty, or property without due process of law. U.S. Const. Amend. V.

The Fourteenth Amendment to the Constitution of the United States, Section 1, provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws. U.S. Const. Amend. XIV, Sec. 1.

The relevant Federal Rules of Evidence provide:

FRE 401. Definition of Relevant Evidence

> "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

FRE 402. Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible

> All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.

FRE 403. Exclusion of Relevant Evidence of Grounds of Prejudice, Confusion, or Waste of Time

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

FRE 404(b). Character Evidence Not Admissible To Prove Conduct; Exceptions; Other Crimes.

> (b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

STATEMENT OF THE CASE

MOHAMMED ENTEZARI-AFSHAR is serving a 25 year sentence pursuant to a conviction of Murder in the First Degree of his former wife, Effie Entezari.

A petition for habeas corpus relief was filed by Mr. Entezari, raising, *inter alia*, the issues that are presented for review before this Court. Following dismissal of the petition, the Honorable Franklin D. Burgess, United States District Judge, Western District of Washington at Tacoma, issued a Certificate of Appealability, because "[T]here was a legal question worthy of consideration in the petitioner's second and fourth issues". (App. C).

The second (issue) regarded whether the admission of a remark made by the petitioner to Kenneth and Teresa Ward might have been so prejudicial as to deprive the petitioner of a fair trial; the fourth issue, likewise worthy of consideration, regarded newly discovered evidence. (App. C).

The record reflects that the courts had the following facts before them, in consideration of the petition for writ of habeas corpus, and on direct appeal to the Ninth Circuit Court of Appeals: Kenneth and Teresa Ward and family lived in one of Mr. Entezari's rentals. Mr. Ward had had two altercations with Mr. Entezari, one during which Mr. Entezari had called the police for help in having Mr. Ward removed from his property. Mr. Ward had been sent a letter from Mr. Entezari's attorney stating that any similar future conduct on the part of Mr. Ward would result in legal action taken again him. The relationship between the Wards and Mr. Entezari was extremely hostile.

Newly discovered evidence was presented to the District Court and the Ninth Circuit Court of Appeals, which could have been easily available and discovered through investigatory means by the State. For example:

Members of the Razzaghy family with whom Effie Entezari was residing shortly before her death, had pending criminal charges which disappeared after testifying at the trial of Mr. Entezari.

During the course of performing her duties as the personal representative of her mother's estate, Pooneh Entezari discovered a bank account containing $23,000.00 held and owned by Effie Entezari, but under a name other than Effie Entezari, which had had a $4000.00 withdrawal by a person unknown, six months after Effie Entezari's death. Also, a Certificate of Deposit account held by Effie Entezari disappeared some time after her death.

Effie Entezari had, at the time of her death, $600.00 worth of checks issued by Nahid Razzaghy that were written on a closed bank account, held and owned by Nahid Razzaghy, and never cashed by Effie Entezari.

Nahid Razzaghy spent nearly $15,000.00 for the purchase of a day-care center, the subsequent remodeling of said day-care center, and two additionally purchased residences, shortly after the death of Effie Entezari. Oddly, this had occurred in spite of the fact that during this time Nahid Razzaghy had no financial means and further was subject to several civil actions filed by various collection agencies.

The real estate closing of the day-care center purchase by Nahid Razzaghy took place in the same building as the law office of Karen DeDona on the day of Effie Entezari's death. Ironically, Mr. Entezari was at Karen DeDona's office at that time. He had sought legal counsel after his car had been searched, and law enforcement had advised him that a search warrant would soon issue for his residence. During the prior consensual search of Mr. Entezari's car at the hospital where he was found by law enforcement, no gun was found in his vehicle. To his surprise, the gun was found in the same car at his residence, during a second search.

Nahid Razzaghy, in March, 1989, had been given an ultimatum by her day-care landlord, that she needed to purchase the day-care center or her lease would be terminated. Nahid Razzaghy requested a one month extension of time to purchase the day-care center; the extended purchase date coincided with the date of the death of Effie Entezari.

Nahid Razzaghy told investigators that she was Effie Entezari's best friend on one occasion; she said that she was Effie Entezari's sister on another occasion, although she was not related. Effie Entezari had lived with Nahid Razzaghy and her family members in a rental owned by Mr. Entezari and Effie Entezari. However, shortly before the death of Effie Entezari, Nahid and her family had been evicted from the rental by Mr. Entezari, with the approval of Effie Entezari, who then secured her own dwelling, where she was ultimately killed.

Nahid Razzaghy is the individual who implicated the daughter of Effie Entezari, Pooneh Entezari, as a suspect

to law enforcement, for the killing of Effie Entezari. Unfortunately law enforcement believed Nahid Razzaghy, and went so far as to tell potential witnesses not to answer questions by the daughter, Pooneh Entezari, about her mother's death.

The daughter, making her own investigation, learned that the yellow Datsun automobile which was viewed leaving the scene of Effie Entezari's murder, matched the description of a vehicle owned by a Razzaghy family member.

She also learned that a blue vehicle which was seen "scoping" Effie Entezari's apartment complex two weeks prior to her death, was similar to that owned by a Razzaghy family member.

Pooneh Entezari, daughter of the deceased, had requested the police to investigate the Razzaghy family as it was Pooneh's belief that the Razzaghy's were responsible for her mother's death.

Pooneh Entezari contacted the police on several other occasions with information that she believed would exonerate her father, which included the following:

Domestic violence calls for assistance had been made from Effie Entezari's apartment complex, involving Effie Entezari and a male person who spoke a foreign language and who did not match the description of her father.

A resident of the apartment complex, Diana Getzlaff, had heard on the morning of the murder, a loud conversation in the parking lot of the apartment complex, a large pop, and had noticed a car similar to a yellow Datsun backing up at a high rate of speed near where

Effie Entezari's body was found. The vehicle drove away at a high rate of speed.

Another neighbor had spotted a blue car one week prior to the murder of Effie Entezari in which a person in the vehicle appeared to be "scoping" the apartment of Effie Entezari in the early morning hours.

Numerous bruises on the body of Effie Entezari which appeared to be the result of physical abuse, were viewed by Pooneh Entezari and Karen DeDona, Attorney at Law.

When Effie Entezari's daughter, Pooneh Entezari, was allowed to enter her mother's apartment, she discovered that most of her mother's jewelry was missing.

Even though Pooneh Entezari provided the police with the above information, the police did not investigate her concerns that the Razzaghy family was involved in her mother's death. In fact, the police not only ignored Pooneh's pleas to check into the Razzaghys' background, but were in fact hostile towards her, as the police viewed Pooneh as a potential suspect, due to the information provided to them by Nahid Razzaghy.

REASONS FOR GRANTING THE WRIT

I. Resolution of the question of whether a district court's failure to hold an evidentiary hearing on petitioner's claims is important to secure the proper application of fundamental Constitutional rights.

II. Resolution of whether the district court is required to hold an evidentiary hearing is required where such failure defeats the purpose of the writ, and so far departs from the accepted and usual course of judicial proceedings as to call for this Court's exercise of its supervisory power.

Resolution of the question of whether a district court's failure to hold an evidentiary hearing on petitioner's claim is imperative where the district court ignored the inherent prejudice towards Iranians during the time-frame of the trial of Mr. Entezari. Coupled with the rush of the state to convict Mr. Entezari (reflected in the lack of investigation, see Questions Presented for Review), failure to remand for an evidentiary hearing defeats the purpose of the writ, and so far departs from the accepted and usual course of judicial proceedings as to call for this Court's exercise of its supervisory power.

The United States Supreme Court has held that the federal judiciary must resolve any factual dispute material to a claim appropriately raised in a habeas corpus petition and resolution of factual disputes requires an evidentiary hearing in most cases. *See, e.g., Ford v. Wainwright*, 477 U.S. 399 (1986). Consistent with Rule 8(a) of the Rules Governing § 2254 cases, the court must review the proceedings, along with any expanded record, and

make a determination whether to hold an evidentiary hearing. (App. D).

Evaluation of this question begins with the seminal case of *Townsend v. Sain*, 372 U.S. 293 (1963). In *Townsend*, the Supreme Court reversed a district court's dismissal of a habeas corpus because the lower court improperly had refused to hold an evidentiary hearing on the petition. The Court identified a strong federal policy favoring hearings, because punishment obtained in violation of the Constitution is intolerable and the "opportunity for redress, which presupposes the opportunity to be heard, to argue and present evidence, must never be totally foreclosed." 372 U.S. at 322 (*citing Frank v. Mangam*, 237 U.S. 309, 345-50 (1915) (Holmes, J., dissenting)). "[H]earing power" must be broad because

> a narrow view of the hearing power would totally subvert Congress' specific aim in passing the Act of February 5, 1867, of affording state prisoners a forum in federal trial courts for the determination of claims of detention in violation of the Constitution. The language of Congress, the history of the writ, the decisions of this Court, all make clear that the power of inquiry on federal habeas corpus is plenary. 372 U.S. at 292.[1]

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[1] Congress later reaffirmed the presumption in favor of evidentiary hearings on potentially meritorious federal habeas corpus claims. *See* Advisory Committee Notes to Rule 7 and 8 ("by far the majority" of petitions that cannot be disposed of summarily "raise . . . issues that necessitate an evidentiary hearing").

Townsend and its progeny have set forth principles to guide the district court's determination whether to hold an evidentiary hearing regarding any habeas claims. First, the *Townsend* Court held that the court always has the authority to hold evidentiary hearings on habeas corpus claims. Second, the court identified six situations where such hearings are required:

> If (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state court hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair hearing.

Townsend, 372 U.S. at 313.[2] The first, third, fourth, fifth and sixth factors are all present in this case and a hearing is mandatory.

The Ninth Circuit's opinion – that Entezari is not entitled to an evidentiary hearing – conflicts with this

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[2] The Court revisited one aspect of the *Townsend* decision in *Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992). Discussing *Townsend*'s fifth circumstance (where "the material facts were not adequately developed at the state court hearing"), the Court held that a hearing is not *mandatory* unless the petitioner can show cause for failing to develop the material facts in state court and prejudice resulting therefrom). The *Tamayo-Reyes* decision, however, does not detract from the conclusion that a hearing is required in this case. Cause and prejudice are shown here.

court's decision in *Townsend v. Sain*, 372 U.S. at 318 (1963). Therein, the Court announced the general rule that a federal evidentiary hearing is required if the habeas applicant did not receive a full and fair hearing in a state court, either at the time of the trial or in a collateral proceeding. Here, there has been no full and fair hearing in a state court, because the facts subsequently discovered by Pooneh Entezari were not discovered by the state prior to trial, for failure to adequately investigate the Razzaghy family and its involvement surrounding the death of Effie Entezari.

Even under this Court's ruling in *Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992), which arguably limited the circumstances for an evidentiary hearing, the petitioner herein, Entezari, is entitled to a hearing. In *Tamayo-Reyes, supra*, the Court held that a habeas applicant is entitled to an evidentiary hearing if he can show cause for his failure to develop the facts in state-court proceedings and actual prejudice resulted from that failure. In *Tamayo-Reyes*, the Supreme Court held that an evidentiary hearing is not *mandatory* under *Townsend*'s fifth circumstance ("the material facts were not adequately developed at the state court hearing") unless the petitioner can show cause for failing to develop the material facts in state court and prejudice resulting therefrom. *See Chacon v. Wood*, 36 F.3d 1459, 1465-66 (9th Cir. 1994). In all other regards, *Townsend* is good law. *See Id.*[3]

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[3] For this reason, Petitioner is *not* required to show cause and prejudice to obtain a hearing under the first, second, third, fourth, and sixth factors which were enumerated in *Townsend*. *See Chacon*, 36 F.3d at 1465-67 and nn. 3 and 7.

Keeney v. Tamayo-Reyes, supra, did not affect the *Townsend* holding with respect to the district court's broad authority to consider **any** evidence relevant to a federal habeas petitioner's claim, and conduct an evidentiary hearing when necessary. *Seidel v. Merkle,* 97-15786, (9th Cir., 7-20-98) (wherein the Ninth Circuit rejected the state's argument that the district court erred in granting Seidel an evidentiary hearing without first requiring him to demonstrate cause for his failure to develop the facts in state court and actual prejudice resulting from that failure).

In *Seidel v. Merkle,* the court held where material facts are disputed the holding of a hearing is in the discretion of the district judge. *Id., citing Townsend v. Sain,* at 311.

The core of due process is the right to notice and a meaningful opportunity to be heard. *LaChance v. Erickson,* ___ U.S. ___, 118 S.Ct. 753, 756, (1998) (*citing Cleveland Bd. of Ed. v. Loudermill,* 470 U.S. 532, 542, 105 S. Ct. 1487, 1493 (1985)) (emphasis added). In *United States v. Hayman,* 342 U.S. 205, 72 S. Ct. 263, 272 (1952), this Court held that "a hearing, as referenced in 2255 has obvious reference to the tradition of judicial proceedings". *Id.* at 272, n. 30 (*citing Morgan v. United States,* 298 U.S. 468, 480, 56 S. Ct. 906, (1936)). Furthermore, this Court recognized that a person on a motion under 2255 "denied an opportunity to be heard, 'has lost something indispensable' . . . " *Id.* at 272-273, n. 31 (*citing Snyder v. Commonwealth of Massachusetts,* 291 U.S. 97, 116, 54 S. Ct. 330, 336 (1934)). Although the action in this case fell under 28 U.S.C. 2254, Mr. Entezari has lost the indispensable right to due process.

The Fifth and Fourteen Amendments state that a person cannot be deprived of liberty "without due process of law". U.S. Const. Amend. 5., Amend. 14. This includes a "meaningful opportunity to be heard." *LaChance*, ___ U.S. ___, 118 S. Ct. at 756. Here, the meaningful hearing should require the district court to receive testimonial and documentary evidence regarding the Razzaghy's family and its role in the events surrounding the death of Effie Entezari.

It is no fault of Mr. Entezari that the facts were not developed prior to trial. Absent an adequate investigation by law enforcement, and without an evidentiary hearing, neither the District Court, nor the Ninth Circuit Court of Appeals could make a proper determination of Mr. Entezari's claim of denial of his right to a fair trial, and his claim of innocence.

CONCLUSION

For the foregoing reasons, Mr. Entezari respectfully requests this Court to grant the petition for writ of certiorari.

Dated this 29th day of March 1999.

Respectfully submitted,

LANA C. GLENN
Counsel for Mohammed Afshar

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APPENDIX A

NOT FOR PUBLICATION

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MOHAMMED ENTEZARI-AFSHAR, Petitioner-Appellant, v. ROBERT WRIGHT; CHRISTINE O. GREGOIRE, Respondents-Appellees.	No. 98-35230 D.C. No. CV-97-05239-FDB MEMORANDUM* (Filed Dec. 30, 1998)

Appeal from the United States District Court for the Western District of Washington Franklin D. Burgess, District Judge, Presiding

Argued and Submitted November 6, 1998
Seattle, Washington

Before: CANBY and HAWKINS, Circuit Judges, and SILVER,** District Judge.

Mohammed Entezari-Afshar ("Entezari"), in the custody of the Washington State Department of Corrections following his conviction for first degree murder, appeals the district court's summary judgment denial of his federal habeas corpus petition. We affirm.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36.3.

** Honorable Roslyn O. Silver, United States District Judge for the District of Arizona, sitting by designation.

Entezari's claim concerning the admission of the Wards's testimony lacks merit. Habeas relief is generally unavailable for alleged errors in the interpretation and application of state evidentiary law. *See Estelle v. McGuire*, 502 U.S. 62 (1991); *Engle v. Issac*, 456 U.S. 107, 119 (1982); *Butcher v. Marquez*, 758 F.2d 373, 378 (9th Cir. 1985); *Middleton v. Cupp*, 768 F.2d 1083, 1085 (9th Cir. 1985). To obtain habeas relief a petitioner must demonstrate that its admission "rendered his trial so fundamentally unfair as to violate federal due process." *Kealohapouole v. Shimoda*, 800 F.2d 1463, 1465 (9th Cir. 1986); *Butcher*, 758 F.2d at 378. "The category of infractions that violate 'fundamental fairness' " is a very narrow one. *McKinney v. Rees*, 993 F.2d 1378, 1380 (9th Cir. 1993) (citation omitted).

While the testimony was potentially prejudicial, it was also probative, material and not too far removed in time. *See e.g., Walters v. Maass*, 45 F.3d 1355, 1357 (9th Cir. 1995). Moreover, the testimony was not so inflammatory and emotionally charged as to render a fair trial impossible. *See Kealohapauole*, 800 F.2d at 1465-66. There was also ample evidence, such as the gun and Entezari's lack of alibi, linking Entezari to the murder of his wife. Given the narrow scope of review, the testimony cannot be said to be so fundamentally unfair as to have deprived Entezari of due process.[1]

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[1] Under the AEDPA, a petition shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication either: (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of

Entezar's claim that "new" evidence establishes his innocence and he is, therefore, the victim of a fundamental miscarriage of justice cannot be reached by this court because Entezari did not exhaust this claim in state court. In *Coleman v. Thompson*, 501 U.S. 722, 750 (1991), the Supreme Court held that federal habeas review of such claims is barred "unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation . . . or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice."

Entezari also did not establish that an external factor *caused* his default. *Murray v. Carrier*, 477 U.S. 478, 488 (1986). Virtually all the information in his daughter's affidavit was available at the time of his trial or could have been obtained through due diligence. Entezari also failed to show prejudice, "actual harm resulting from the alleged constitutional violation." *Thomas v. Lewis*, 945 F.2d 1119, 1123 (9th Cir. 1991); *see also United States v. Frady*, 456 U.S. 152, 170 (1982). There was strong circumstantial evidence of his guilt presented at trial left uncontradicted, such as his possession of the murder weapon, and his opportunity to commit the crime. *See Quigg v. Crist*, 616 F.2d 1107, 1112 (9th Cir. 1980). Because the "new" evidence does not directly exculpate Entezari, he cannot show that it is likely the jury would have come to a different conclusion based on the additional evidence. Finally, on the basis of these facts, we cannot say that

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the facts in light of the evidence presented in the State court proceedings. 28 U.S.C. § 2254(d) (1998). Neither of these two requirements are met here.

Entezari's claim fits within the narrow "fundamental miscarriage of justice" exception.

AFFIRMED.

APPENDIX B

NOT FOR PUBLICATION

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MOHAMMED ENTEZARI-AFSHAR, Petitioner-Appellant, v. ROBERT WRIGHT; CHRISTINE O. GREGOIRE, Respondents-Appellees.	No. 98-35230 D.C. No. CV-97-05239-FDB (Western Washington) ORDER (Filed Feb. 17, 1999)

Before: CANBY and HAWKINS, Circuit Judges, and SILVER,[1] District Judge.

The panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has called for a vote to rehear this matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

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[1] Honorable Roslyn O. Silver, United States District Judge for the District of Arizona, sitting by designation.

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

MOHAMMED ENTEZARI-AFSHAR, Petitioner-Appellant, vs. ROBERT WRIGHT, Respondent-Appellee.	No. C97-5239FDB CERTIFICATE OF APPEALABILITY (Filed Feb. 13, 1998)

A certificate of probable cause should issue if a petition presents "a substantial legal question worthy of consideration", i.e., that it presents issues that "are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further." *Rogers v. State of Wisconsin*, 812 F.Supp. 905, 906 (E.D.Wisc. 1993) (citations omitted).

Pursuant to the Anti-Terrorism and Effective Death Penalty Act, a certificate of appealability must indicate which specific issue or issues satisfies the appealability standard. 28 U.S.C. § 2253(c)(3).

I do not agree that the petitioner's first claim, pertaining to a search-and-seizure issue, has any debatable merit in light of *Stone v. Powell*, 428 U.S. 465 (1976).

However, I agree that there is a legal question worthy of consideration in the petitioner's second and fourth issues. The second regards whether the admission of a remark made by the petitioner to Kenneth and Teresa

Ward might have been so prejudicial as to deprive the petitioner of a fair trial. While I do not agree that this was the case, it is not inconceivable that the content of the remark might have strongly flavored the evidence before the jury.

The petitioner's fourth issue, newly discovered evidence, is likewise worthy of some consideration.

(The petitioner's third issue is derivative of the first and second issues; it is worthy of review only if the Court of Appeals were to find merit in the petitioner's second issue as described above.)

Accordingly, I agree that the Petitioner is appealing in good faith, and I agree that another court might have reached a different decision on either of the issues discussed above. It is hereby

ORDERED that a Certificate of Probable Cause is issued.

DATED this 18 day of February, 1998.

/s/ Franklin D. Burgess
FRANKLIN D. BURGESS
UNITED STATES DISTRICT JUDGE

APPENDIX D

§ 2254. State custody; remedies in Federal courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless sit appears that –

(A) the applicant has exhausted the remedies available in the courts of the state; or

(B)(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that –

> (A) the claim relies on –
>
> (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(g) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(h) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the

court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.